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In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES M. ZARZECKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's scheme to deceive an issuer and public investors about the market value of the issuer's securities by engaging in securities transactions for the purpose of depressing the market price constitutes unlawful manipulation under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 937 F.2d 823. An order amending that opinion (Pet. App. 52a-54a) is reported at 946 F.2d 188.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. A petition for rehearing was denied on October 2, 1991. On December 9, 1991, Justice Thomas extended the time within which to file a petition for a writ of certiorari to January 30, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to violate the tax and securities laws and to commit mail and wire fraud, in violation of 18 U.S.C. 371; one count of participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); mail and wire fraud, in violation of 18 U.S.C. 1341 and 1343; two counts of securities fraud, in violation of 15 U.S.C. 78j(b) (Section 10(b) of the Securities Exchange Act of 1934) and 17 C.F.R. 240.10b-5 (Rule 10b-5 thereunder); and five counts of filing false partnership returns, in violation of 26 U.S.C. 7206(2). He was sentenced to three months' imprisonment, to be followed by two years' probation, and fined a total of $165,000. In addition, he was ordered to forfeit property. The court of appeals affirmed the convictions on the conspiracy count, four of the wire fraud counts, and the two securities fraud counts. It reversed the convictions on all the remaining counts. Pet. App. 1a-21a, 54a.

1. In March 1985, the firm of Drexel Burnham Lambert, Inc. (Drexel) was retained to underwrite a $25 million convertible bond offering for C.O.M.B. Co. (COMB), a company whose stock was traded in the over-the-counter market. Convertible bonds pay a fixed rate of interest and are convertible into common stock at a pre-determined price. The higher the market price of the stock when the bonds are offered, the more advantageous the bonds will appear from the standpoint of their convertibility into stock. The bonds can therefore be sold at a lower interest rate.

The lower the interest rate on the bonds, however, the harder it will be for the underwriter to market the bonds to investors who desire to earn interest income. Pet. App. 11a.

In connection with the COMB underwriting, Drexel scheduled a meeting with COMB for the evening of April 11, 1985, to price the bonds. One of the factors that would influence the bonds' pricing was the closing price of COMB's common stock on that day. Gov't C.A. Br. 36. Believing that COMB was "levitating" the price of its stock to a higher range in anticipation of the bond offering, Drexel devised a scheme to depress the price of COMB stock. Pet. App. 11a. Petitioner was a trader for the investment firm of Princeton Newport Partners. Shortly after noon on April 11, Drexel bond trader Bruce L. Newberg telephoned petitioner, told him about the COMB bond offering, and asked him to depress the price of COMB stock by selling it short.[1] Newberg also assured petitioner that he would be "indemnified" in that transaction.[2] Gov't C.A. Br. 36-37. Newberg stated:

> I want you to, you know, get rid of it, * * * I want it down to at least 15¾, and hopefully

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[1] A short sale is a sale of stock that the seller does not own. At the time of the sale, the seller delivers borrowed stock; subsequently, the short seller must purchase stock to return the shares it previously borrowed. The short seller expects to profit from a decline in the price of the stock. See *United States* v. *Naftalin*, 441 U.S. 768, 770 (1979).

[2] Newberg was precluded from engaging in transactions in COMB stock for Drexel because that firm had put COMB securities on its "restricted list" in light of its role as underwriter of the bond offering. Gov't C.A. Br. 36. Restricted lists are commonly adopted to comply with the federal securities laws' prohibition against misuse of material nonpublic information.

> lower. Um, I wouldn't mind you selling a little bit first. And um, you're indemnified, * * * you know what I'm saying.

Id. at 37.

Petitioner immediately arranged to sell 10,000 shares of COMB stock to Jefferies & Co., a brokerage firm that made a market in COMB stock. When Jefferies' representative began asking questions about the transaction, petitioner became concerned. Rather than sell more COMB stock himself, petitioner asked a friend at another brokerage firm to sell COMB stock to Jefferies on petitioner's behalf, and to conceal petitioner's identity. Through that device, petitioner sold short 30,000 more COMB shares. Gov't C.A. Br. 37. Petitioner reported the subterfuge to Newberg, who remarked approvingly, "[w]elcome to the world of being a sleaze." *Id.* at 38. The price of COMB stock did not fall in response to petitioner's short sales, and he informed Newberg that he had failed to "dent them." *Ibid.* About an hour later, Newberg indicated that "if they take it up I want to hit 'em again." *Ibid.*

2. The jury was instructed to consider whether petitioner violated Section 10(b) and Rule 10b-5 through his short sales of COMB stock, and whether he committed wire fraud in connection with the same transactions. The trial court's instructions explained to the jury that the same scheme to defraud was involved in both the securities fraud and the wire fraud charges:

> The government contends that these sales [of COMB common stock] were executed in furtherance of a scheme to defraud COMB of money by driving the price of its common stock down, so that Drexel could obtain more favorable terms from COMB in its underwriting of an issue of COMB convertible bonds.

C.A. App. 4236 (wire fraud instructions); *id.* at 4235 ("the government charges * * * that [petitioner] and Mr. Newberg schemed to defraud COMB of money by manipulating the market price of its common stock"); *id.* at 4260-4261 (securities fraud instructions; court stated that "I've already explained to you the government's contentions regarding the fraudulent purpose of [petitioner's] sale of COMB common stock"). The court also instructed the jury that petitioner could be held liable for personally committing acts prohibited by Rule 10b-5, or for aiding and abetting such violations. C.A. App. 4262.

With respect to the elements of the Rule 10b-5 charge, the court instructed the jury to consider three categories of misconduct. C.A. App. 4262. First, the jury was to consider whether petitioner engaged in "[any] device, scheme or artifice to defraud," which is prohibited by Rule 10b-5(a). Second, the jury was to consider whether petitioner made "an untrue statement of a material fact" or omitted "a material fact necessary in order to make the statement not misleading," which is prohibited by Rule 10b-5(b). Third, the jury was to consider whether petitioner engaged in "any act, practice or course of conduct which would operate or did operate as a fraud or deceit upon any person," which is prohibited by Rule 10b-5(c). C.A. App. 4262-4263. On two of the securities fraud counts, the jury found that the government had proved that petitioner violated subsections (a) and (c) of Rule 10b-5, and that it had not proved that petitioner violated subsection (b) of that Rule. The jury also concluded that the government had established the other elements re-

quired for a violation of Rule 10b-5. C.A. App. 4350-27 to 4350-29.[3]

The district court denied petitioner's motion for acquittal. In recognition of the harm to public confidence caused by petitioner's "schemes to manipulate and corrupt the nation's financial markets," the court also ordered forfeiture of petitioner's partnership assets in Princeton Newport. Pet. App. 48a. The court noted that "[t]he federal securities laws were designed to preserve the integrity of the country's financial markets and to protect them from the kind of manipulation [petitioner] and Newberg engaged in their effort to hold down [the price of] COMB stock." *Ibid.*

3. On appeal, petitioner relied on *Chiarella* v. *United States*, 445 U.S. 222 (1980), in arguing that the jury instructions erroneously permitted him to be convicted for nondisclosure to the purchasers of the manipulated securities, when he had no legal duty to make any disclosure because he was not a fiduciary of those purchasers. The court of appeals rejected that claim, holding that petitioner's participation in a scheme to use "devious means to depress the price" of COMB stock constituted a violation of Section 10(b) and Rule 10b-5. The court explained that petitioner's scheme operated to deceive the marketplace about the pricing of publicly traded stock, and fit within the "full range of ingenious devices that might be used to manipulate securities prices." Pet.

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[3] Petitioner was also convicted on the related wire fraud counts. See C.A. App. 309-310 (Indict. Counts 48-51, charging violations of the wire fraud statute); C.A. App. 4350-26 to 4350-27 (jury verdict finding petitioner guilty on Counts 48-51). The jury acquitted petitioner on one count of securities fraud that charged an additional sale of COMB securities. C.A. App. 4350-30.

App. 12a, quoting *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 477 (1977). The court of appeals found that *Chiarella* v. *United States*, *supra*, which considered disclosure duties in the insider trading context, is not applicable in the case of a market manipulation scheme. Pet. App. 13a.

ARGUMENT

Petitioner contends that his participation in a scheme to manipulate the price of COMB's common stock was not a crime, and that the court of appeals' affirmance of his conviction conflicts with decisions of this Court. The decision below, however, is correct, is consistent with the decisions of this Court, and does not conflict with any decision of another court of appeals. Review by this Court is therefore not warranted.

1. Petitioner asserts that he committed no crime because he "merely sold stock" with a "hope" that his trading would lower the market price of COMB securities. Pet. 15. That is an erroneous description of what petitioner did. Petitioner sold COMB stock in furtherance of Drexel's scheme to perpetrate a fraud on COMB. Drexel's goal was to obtain more favorable terms in COMB's bond offering; to achieve that end, Drexel had petitioner enter the market in the guise of a legitimate and independent seller of COMB stock. Pet. App. 12a. Petitioner himself took no market risk in these transactions because Drexel had "indemnified" him. He simply engaged in short sales designed to lower the market price of COMB's stock, while giving the market the misleading impression that he was engaging in bona fide transactions. The court of appeals properly found that this conduct fell within the range of "ingenious devices" that Con-

gress meant to prohibit under Section 10(b) of the Exchange Act. Pet. App. 12a, quoting *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 477 (1977).[4]

Petitioner's contention (Pet. 11-14, 19-21) that his conviction is inconsistent with this Court's decisions in *Chiarella* v. *United States*, 445 U.S. 222 (1980), and *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1 (1985), is incorrect. Petitioner suggests (Pet. 11-12) that he was convicted only of nondisclosure in this case because the jury did not find that he made "an untrue statement of a material fact or omitted to state a material fact necessary to make facts stated not misleading" in violation of Rule 10b-5(b); he then argues that under *Chiarella*, a nondisclosure conviction cannot stand absent proof of a breach of a fiduciary duty. The conviction in this case, however, rests on petitioner's "false and fictitious acts" of manipulation, *Schreiber*, 472 U.S. at 7 n.4 (quoting *Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724, 730), which the jury concluded amounted to a "device, scheme or artifice to defraud" and "an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller of COMB common stock," in violation of Rule 10b-5(a) and (c). See C.A. App. 4350-27 to 4350-29. Those provisions are not limited to fraud by nondisclosure; "they are flat prohibitions

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[4] Petitioner was also convicted of wire fraud, but the question presented by the petition does not separately challenge those convictions. Pet. (I). Nor does petitioner cite any authority for his claim (Pet. 3) that his wire fraud convictions must fall if he did not commit securities fraud. Cf. *Carpenter* v. *United States*, 484 U.S. 19, 24 (1987) (affirming mail and wire fraud convictions unanimously, but affirming securities fraud convictions growing out of the same scheme by an evenly divided Court).

of deceitful practices and market manipulations." *United States* v. *Charnay*, 537 F.2d 341, 350 (9th Cir.), cert. denied, 429 U.S. 1000 (1976).[5]

By engaging in the conduct for which he was convicted, petitioner acted to deceive COMB, persons trading in COMB stock, and offerees of COMB convertible bonds about the market value of COMB stock. His trades were designed to give the false appearance that the COMB stock price was falling because of bona fide trading activity, an appearance that would not have existed in the free interplay of supply and demand. See *Santa Fe Indus., Inc.*, 430 U.S. at 476 (manipulation includes "rigged prices, that are intended to mislead investors by *artificially* affecting market activity") (emphasis added). Petitioner's concealment of his identity, of the fact that he was acting for Drexel, and of Drexel's agreement to indemnify him for any losses he suffered is probative of his purpose to deceive COMB and the investing public. See *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1041 (2d Cir. 1984) (noting that use of dummies or fictitious parties is a common sign of fraud). Deception of the

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[5] In *Charnay*, the court of appeals affirmed the defendant's conviction for manipulating security prices without requiring a showing of a breach of a fiduciary duty. 537 F.2d at 349-350. Petitioner acknowledges (Pet. 17 n.7) that *Charnay* supports the decision in this case, but simply claims that in light of later decisions of this Court, it is not "valid authority." No decision of this Court, however, suggests that a market manipulation scheme is lawful unless the defendant also commits fraud by breaching a fiduciary duty. Rather, the Court has recognized that "manipulation" includes "practices, such as wash sales, matched orders, *or rigged prices*, that are intended to mislead investors by artificially affecting market activity." *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. at 476 (emphasis added).

public and COMB as to the true nature of his transactions, and of Drexel's behind-the-scenes role in those transactions, was essential for petitioner's scheme to work.

It has long been recognized that stock trades made without verbal misrepresentations, but executed solely for the purpose of raising the stock price, can be fraudulent. See *Scott* v. *Brown, Doering, McNab & Co.*, *supra* (broker who bought shares for the sole purpose of causing trading on the exchange at a premium defrauded the public through false acts).[6] Petitioner was convicted for such affirmative acts of deception. Unlike in *Chiarella*, in which a trader simply remained silent about material information concerning a stock's value when engaging in securities transactions,[7] or in *Schreiber*, in which all material facts associated with a tender offer were fully disclosed,[8] petitioner engaged in affirmative conduct designed to deceive investors by creating an artificial

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[6] In *Schreiber* v. *Burlington Northern, Inc.*, *supra*, this Court quoted with approval the statement of Lord Lopes in *Scott* that "I can see no substantial distinction between false rumours and false and fictitious acts." 472 U.S. at 7 n.4, quoting [1892] 2 Q.B. at 730.

[7] In *Chiarella*, the Court held that a financial printer who deduced the names of takeover targets from documents submitted to his print shop and then purchased stock in those companies had not violated Rule 10b-5 by trading without disclosure to the sellers. The Court held that disclosure in that instance is not required absent a "duty to disclose arising from a relationship of trust and confidence between parties to a transaction." 445 U.S. at 230.

[8] In *Schreiber*, the Court held that an acquiring company's revision of the terms of its tender offer did not constitute a violation of Section 14(e) of the Exchange Act, 15 U.S.C. 78n(e), when there was no allegation of misrepresentation, nondisclosure, or deception. 472 U.S. at 1.

market price for COMB stock. The duty to refrain from such affirmatively deceptive conduct does not depend on whether the defendant has a fiduciary relationship to investors in the market. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 (1976) (defining manipulation as "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of a security").[9]

2. Petitioner suggests that the court of appeals approved a "radical new theory" that criminalizes a trade solely on the basis of the trader's purpose. Pet. 10 n.3. There is, however, nothing novel about the theory underlying petitioner's conviction. The courts of appeals that have addressed such manipulative schemes have uniformly concluded that trades made to affect security prices violate Rule 10b-5. See *Pagel, Inc.* v. *SEC*, 803 F.2d 942, 945-946 (8th Cir. 1986); *Alabama Farm Bureau Mutual Casualty Co.* v. *American Fidelity Life Ins. Co.*, 606 F.2d 602, 611-613 (5th Cir. 1979), cert. denied, 449 U.S. 820 (1980); *United States* v. *Charnay*, 537 F.2d at 347-351; *Schlick* v. *Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974), cert. denied, 421 U.S. 976

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[9] Petitioner also errs in his alternative claim that, even if he had a duty to make disclosure, it would not extend to his "subjective motivation" for selling stock. Pet. 18-19, citing *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2760 (1991) ("disbelief or undisclosed motivation, standing alone, [is] insufficient to satisfy the element of fact" under the proxy antifraud provisions). *Virginia Bankshares* held that a board of directors' statement of reasons for recommending a transaction in a proxy solicitation could not be challenged as fraudulent solely on the ground that the directors may not have believed the reasons they gave. That holding is perfectly consistent with the holding here that security trades constitute unlawful manipulation when made for the purpose of affecting market prices.

(1975); see also *Landy* v. *FDIC*, 486 F.2d 139, 161 (3d Cir. 1973) ("scheme deliberately calculated to manipulate the market value of a stock" is covered by Rule 10b-5), cert. denied, 416 U.S. 960 (1974); *Crane Co.* v. *Westinghouse Air Brake Co.*, 419 F.2d 787, 793 (2d Cir. 1969) (scheme in which company "painted the tape" with trades solely to manipulate market price violated Rule 10b-5), cert. denied, 400 U.S. 822 (1970). Moreover, short-selling schemes similar to petitioner's have long been the subject of civil enforcement actions brought by the Securities and Exchange Commission, see *Delafield & Delafield*, [1967-69 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,648 (1968), as well as criminal prosecutions, see *United States* v. *Charnay*, *supra*; *United States* v. *Lewis*, [1989 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 94,479 (S.D.N.Y. 1989).

Petitioner brushes aside (Pet. 17 n.7) that law by suggesting that the defendants in most of those cases, unlike petitioner, were underwriters or corporate officers with a duty to disclose their manipulative trades. The defendants in *Charnay* and *Crane*, however, were not such persons, and none of the cases suggests that the existence of a fiduciary duty is required to establish liability. Rather, the cases are premised on the view that manipulative trading subverts the integrity of the market. As the SEC has explained, Rule 10b-5 bans trades made for the purpose of manipulating stock prices because their effect "is to distort the character of the market as a reflection of the combined judgments of buyers and sellers, and to make of it a stage-managed performance." *Halsey, Stuart & Co.*, 30 S.E.C. 106, 112 (1949). In any event, since petitioner was acting on behalf of and conspiring with Drexel—an underwriter who, as petitioner concedes (Pet. 4), has a duty to both "the

issuer and the investing public"—petitioner's conduct would be a crime even under his view of these cases.

The elimination of manipulative schemes was one of the central goals of the federal securities laws. In passing the Exchange Act, Congress intended "to insure the maintenance of fair and honest markets" in securities transactions. 15 U.S.C. 78b(3). Because Congress concluded that "[f]requently the prices of securities on [securities] exchanges and [over-the-counter] markets are susceptible to manipulation and control," 15 U.S.C. 78b(3), it prohibited trading activity aimed at deceiving investors about the state of the market for a security. Among the express targets of the Exchange Act were the so-called "pools," groups who engaged in trades for the general purpose of affecting security prices. See S. Rep. No. 1455, 73d Cong., 2d Sess. 30-32 (1934); Poser, *Stock Market Manipulation and Corporate Control Transactions*, 40 U. Miami L. Rev. 671, 691-697 (1986). The committee reports accompanying the Exchange Act noted that such trading interfered with market prices "established by the free and honest balancing of investment demand with investment supply." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10 (1934); S. Rep. No. 1455, *supra*, at 81.

Section 10(b), in particular, was designed to proscribe all intentional conduct designed to deceive investors, including schemes to affect stock prices "beyond the operation of normal market factors." *Alabama Farm Bureau*, 606 F.2d at 611. "Deceitful manipulation of the market price of publicly-owned stock is precisely one of the types of injury to investors at which the [Exchange] Act and the Rule [10b-5] were aimed." *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540, 547 (2d Cir. 1967). Con-

gress understood that the hallmark of manipulation is the perpetrator's purpose. A trade made to affect the market price or induce other trades is manipulative; a trade made merely with the knowledge that it will have an impact on the market price is not. H.R. Rep. No. 1383, *supra*, at 20.[10]

Petitioner argues (Pet. 22-23) that a trade made to affect the market price of a security is lawful so long as it is an actual and not a fictitious trade. The express language of the Exchange Act, however, demonstrates that Congress intended to prohibit actual trading designed to rig market prices. Section 9(a)(2) makes it unlawful to engage in "a series of transactions in any [listed] security * * * creating *actual* or apparent active trading in such security or raising or depressing [its] price * * * for the purpose of inducing the purchase or sale of such securit[ies] by others." 15 U.S.C. 78i(a)(2) (emphasis added); see *United States* v. *Projansky*, 465 F.2d 123 (2d Cir.) (upholding conviction under Section 9(a)(2) for conspiring to raise securities price through actual trading), cert. denied, 409 U.S. 1006 (1972).[11] The

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[10] Commentators at the time understood that Congress intended to prohibit trades undertaken for the purpose of affecting market price. See Comment, *Market Manipulation and the Securities Exchange Act*, 46 Yale L.J. 624, 634 (1937); Berle, *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 405-406 (1938); Note, *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509, 519-520 (1947). Modern commentators agree. See L. Loss & J. Seligman, *Securities Regulation* 3939, 3954-3983 (3d ed. 1991); Poser, *supra*, 40 U. Miami L. Rev. at 699-700; Thel, *Regulation of Manipulation Under Section 10(b); Security Prices and the Text of the Securities Exchange Act of 1934*, 1988 Colum. Bus. L. Rev. 359, 376.

[11] Section 9 applies to securities traded on exchanges and not to over-the-counter stocks such as COMB. For an example

ban of manipulative devices in Section 10(b) was intended to include the practices listed in Section 9, see *SEC* v. *Resch-Cassin & Co.*, 362 F. Supp. 964, 975 (S.D.N.Y. 1973), although it is not limited to them, see *Charnay*, 537 F.2d at 350-351 (Rule 10b-5 bans manipulative trades irrespective of whether Section 9(a)(2)'s requirement of purpose to induce others to trade is present).

Petitioner also suggests (Pet. 22-24) that market manipulation cannot yield profits to wrongdoers unless they make subsequent trades at manipulated prices, that petitioner did not do so, and that he therefore has been convicted of a "victimless crime." Petitioner's tampering with the market's pricing mechanism, however, undermined the market's integrity for all participants, regardless of whether he sought to exploit that advantage through later trading. In any event, the manipulative scheme devised by Drexel and executed by petitioner directly victimized COMB. The government's contention at trial, which the jury accepted, was that Drexel had petitioner sell COMB stock in the over-the-counter market, while indemnifying him against loss, in order to lower COMB's stock price and thereby obtain more favorable terms from COMB in the underwriting negotiations. C.A. App. 4236, 4687-4694. Such a scheme is a far cry from the "victimless" conduct in which petitioner claims he engaged.[12]

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of a short-selling scheme similar to petitioner's that was found to violate both Rule 10b-5 and Section 9(a)(2), see *J.A.B. Securities Co.*, 47 S.E.C. 86, 91-92 (1979).

[12] Petitioner suggests that his manipulation was "socially *beneficial*" and a "public *service*" (Pet. 27, 28) because his purported goal was to counteract COMB's perceived levitation of the price of its stock. There is, however, no safe harbor in

3. Finally, petitioner suggests that the Second Circuit's holding will lead to undesirable consequences for innocent market participants. First, petitioner suggests (Pet. 25-26) that using a trader's purpose to determine the lawfulness of his transactions is dangerous because the line between proper and improper purpose cannot easily be ascertained. Courts, however, are experienced in distinguishing between trades made for investment or other nonmanipulative purposes, see *Chris-Craft Indus., Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 383 (2d Cir.), cert. denied, 414 U.S. 910 (1973); *United States* v. *Mulheren*, 938 F.2d 364, 369 (2d Cir. 1991), and trades made solely to manipulate the price of a security, see *Charnay*, 537 F.2d at 346 n.5. It is a commonplace in the criminal law that whether the defendant's actions are unlawful turns on his purpose and intent. See, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 250-252 (1952). The record in this case, in which petitioner's taped conversations starkly reveal the origins and purpose of his manipulative scheme, refutes petitioner's fears that he was exposed to the "unfair risk of criminal punishment" (Pet. 25).[13]

Rule 10b-5 for manipulations (or other fraudulent devices) undertaken as a self-help remedy for perceived illegal conduct by others. See *Edward J. Mawod & Co.*, 46 S.E.C. 865, 872 (1977), aff'd, 591 F.2d 588 (10th Cir. 1979).

[13] Petitioner understandably relies on hypotheticals to illustrate the risk of unfairness, such as the investor who on "whimsy" seeks to raise the stock price to "honor" his daughter's birthday, or a "wealthy eccentric" who wishes to punish a company whose products he dislikes by driving down its stock price. Pet. 26. Even if petitioner were correct in assuming that such transactions are lawful because investors "put their own money at risk in arm's-length transactions in order to serve noneconomic goals" (Pet. 27), petitioner did

Petitioner also urges that it is bad economics to criminalize trades made for the purpose of manipulating securities prices (Pet. 27), and that he was convicted only because his transactions "do not conform to some economists' conception of why people buy and sell securities" (Pet. 10). He relies on a law review article that argues that there is no evidence that manipulative trades actually affect security prices and that enforcement efforts are too costly. See Fischel & Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 Harv. L. Rev. 503 (1991). The authors of that article admit, however, that " '[t]rading with bad intent' does provide the term 'manipulation' with unique meaning, and such trading may be undesirable if manipulations do affect securities prices." *Id.* at 553.[14] In enacting Sections 9 and 10(b), Congress expressed the view that such trading *is* undesirable. Disagreement with the policy of those provisions should be addressed to Congress, not to the federal courts.

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not do so. Petitioner engaged in an artificial transaction at Drexel's behest in which he was "indemnified" against loss, in order for Drexel to achieve the economic goal of defrauding COMB.

[14] The cases brought against market manipulators demonstrate that many have succeeded. See L. Loss & J. Seligman, *supra*, at 3984-3985 (describing wave of recent market manipulations).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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